

# EXHIBIT B

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
IN SEATTLE

4 MICROSOFT CORPORATION, )  
5 Plaintiff, ) No. C10-1823JLR  
6 v. )  
7 MOTOROLA, INCORPORATED, )  
8 Defendant. )

## **MARKMAN HEARING**

**BEFORE THE HONORABLE JAMES L. ROBART  
UNITED STATES DISTRICT COURT JUDGE**

March 9, 2012

## **APPEARANCES:**

16 For the Plaintiff: Richard A. Cederoth  
17 SIDLEY AUSTIN  
18 Arthur Harrigan  
DANIELSON HARRIGAN LEYH &  
TOLLEFSON

19 For the Defendant: Jesse J. Jenner  
20 Gabrielle Elizabeth Higgins  
ROPS & GRAY  
21 Ralph H. Palumbo  
SUMMIT LAW GROUP

22 Also Present: Christopher Wion  
Douglas Lewis  
Philip McCune  
Andy Culbert  
David Pritikin  
Herman Webley  
23 Matthew Clements  
Ian Brooks

1 news, we have eliminated seven of the ten terms, we  
2 appreciate you doing that, but please don't do it the day  
3 of the hearing.

4 I guess I will order counsel to meet and really confer  
5 on claim terms in the near future, because you have  
6 another Markman hearing coming up in June. And if you do  
7 that to us again, you are going to have a very unhappy  
8 judge, and an even more unhappy clerk.

9 Secondly, it is just a waste of the resources of the  
10 court. We do not have resources to waste.

11 That June date is somewhat up in the air, in that I do  
12 not want you to do another ten terms until we get these  
13 done. So we will try and get these ten processed as  
14 quickly as we can, given that I have opened you up for  
15 further briefing.

16 The last topic then that I thought we would talk about  
17 is, I am happy to hear your constructive proposals on RAND  
18 terms, on how to move that forward. Mr. Jenner, you said  
19 you had some thoughts on that. I'm not sure who is going  
20 to speak for the parties.

21 MR. JENNER: I think Mr. Cederoth had some  
22 comments, but as your Honor might imagine, so do I. I  
23 would be glad to be heard on that.

24 MR. HARRIGAN: I will be the one talking about  
25 that, your Honor. I am ready to do so now, if you wish.

1                   THE COURT: Mr. Harrigan, always nice to hear you  
2 talk.

3                   MR. HARRIGAN: Well, the court said something  
4 earlier about a potential opening in May. My basic  
5 message is, yes, please. We would like to have this  
6 mini-trial happen in May. We think there should be no  
7 reason why it can't happen in May.

8                   The RAND issues that are presented here overlap very  
9 significantly with issues that have already been presented  
10 in the ITC case. The experts have filed reports and  
11 testified, the witnesses' depositions have been taken. In  
12 fact, we could, I believe, agree to have that record used  
13 in part in this case, to the extent it has bearing.

14                  Anyway, the bottom line is, Microsoft would be  
15 prepared to proceed on that basis, and sit down in the  
16 next few days with Motorola and work out a schedule that  
17 would accommodate a date in May.

18                  We actually came in here this morning, your Honor,  
19 with the intention of asking the court for permission to  
20 file a motion, which we understand that's what we need to  
21 do. So we are about to do that. And this May date would  
22 greatly mitigate the problem that we were going to be  
23 addressing in the motion we were going to ask the court to  
24 allow us to file, which is an anti-suit motion relating to  
25 the imminent potential for an injunction to be entered

1       that literally would wipe Microsoft out of a \$1 billion  
2       market in Germany, based upon a set of rules that -- based  
3       upon the very same issues that are before this court.

4           I will not argue my anti-suit motion, but we came in  
5       here today with the intention of getting permission to  
6       file that. Because of the immense imminent damage that  
7       would be done to Microsoft if the German court issued an  
8       injunction, when the issue in this case of whether an  
9       injunction is allowed worldwide, based upon the RAND  
10      interchanges that have occurred, is the very issue for the  
11      court to decide. In other words, this court's ruling on  
12      the issue of whether there is an injunction available to  
13      Motorola will decide the German issue, and it will decide  
14      for the entire world, because the RAND contract has a  
15      worldwide base.

16           At any rate, your Honor --

17           THE COURT: Don't you have that motion on file  
18      right now?

19           MR. HARRIGAN: We have a motion on file to the  
20      effect that no injunction should be issued. The reason --

21           THE COURT: I think it is phrased in terms of no  
22      injunctive relief is available.

23           MR. HARRIGAN: Correct. That's correct, your  
24      Honor.

25           THE COURT: How is your new motion going to be any

1 different?

2 MR. HARRIGAN: The new motion, your Honor, is an  
3 anti-suit motion that enjoins Motorola from enforcing an  
4 injunction in Germany should one be granted on April 17th.  
5 We believe, especially in the Ninth Circuit, such a motion  
6 is highly appropriate. There is quite a difference among  
7 the circuits in the freedom with which such motions are  
8 granted and the standards under which they are decided.

9 For example, your Honor, in Germany, they don't  
10 recognize third-party beneficiaries, they don't recognize  
11 injunctions involve equitable considerations, they don't  
12 recognize a RAND defense. Basically if you don't have a  
13 license, you get enjoined. It doesn't matter how  
14 outrageous the license demand was.

15 So under those circumstances, we believe we are  
16 entitled under the applicable law to have this court enter  
17 an order that precludes Motorola from enforcing any such  
18 injunction, because this court should decide the issue  
19 under the law that is applicable in this case.

20 However, given the fact that April 17th is the date on  
21 which that ruling will be made -- By the way, your Honor,  
22 that case was filed eight months after this one. Just  
23 like in World War II, apparently they believe that  
24 everything happening on a blitzkrieg schedule in Germany.  
25 So it is already over. And that's why Microsoft faces the

1 potential literally to be stopped from selling Windows in  
2 Germany. That is an enormous market.

3 However, it may well be if we have this mini-trial in  
4 May that we can simply make an agreement with Motorola  
5 that, abiding the decision of this court, they will hold  
6 off in enforcing the injunction. It is not  
7 self-enforcing. And Microsoft will put up a \$300 million  
8 bond in order to allow this court to proceed without any  
9 post-potential downside monetary risk to Motorola as a  
10 result.

11 At any rate, your Honor, the bottom line is, we  
12 believe a May date would solve a lot of problems. It  
13 would mitigate this issue. It may obviate the need for us  
14 to file any motion if we can reach agreement with Motorola  
15 that, you know, however long it takes for this court to  
16 decide, there will not be an injunction enforced in  
17 Germany. So we propose that we sit down next week and  
18 work on a schedule to accommodate a May date.

19 THE COURT: Mr. Jenner, I will hear you in a  
20 moment. Let me ask a couple of questions -- not  
21 questions, offer some observations. One, I am flattered  
22 that I can tell the German courts what to do, but I'm not  
23 sure how they are going to react to that.

24 MR. HARRIGAN: It would actually be Motorola you  
25 would be telling what to do.

1           THE COURT: I was just going to say, you have now  
2 couched it in terms of my telling Motorola that they can't  
3 enforce a valid judgment they received in Germany.

4           MR. HARRIGAN: It is analogous to the  
5 first-to-file cases where the first-to-file court enjoins  
6 the party from proceeding in the second filed case, except  
7 it is international. There is a fair amount of case law  
8 on it. One of the main factors is the risk of  
9 inconsistent judgments between the U.S. District Court and  
10 the foreign court.

11           And here the issue is a contract, the RAND contract.  
12 The inconsistent judgment would be they don't even pay any  
13 attention to it. And yet, here, we are entitled to get a  
14 RAND license, either because Motorola breached when it  
15 made its demands, or because we didn't repudiate, and  
16 therefore we are entitled to a RAND license. If the court  
17 makes either one of those rulings, there is no basis for  
18 injunctive relief.

19           THE COURT: All right. Mr. Harrigan, you can go  
20 ahead and sit down, but you are going to get called back  
21 up here.

22           The difficulty that I encounter with my beloved notion  
23 of having either a mini-trial or an expedited trial is how  
24 to get around, or how to incorporate, the fact that under  
25 an unusual set of Washington cases, construction of

1 contracts can, in some circumstances, be a question of  
2 fact. I'm not sure how they reach that, but that's what  
3 they said.

4 Without getting into this, it seems to me that it may  
5 well be that the appropriate way to do this is to ask you  
6 to move for cross-motions for summary judgment on RAND,  
7 put in your affidavits and whatever, and if I stumble into  
8 the area where a jury needs to consider and make findings  
9 of fact in order for me to construe the contract as a  
10 matter of law, we will isolate those and see where it  
11 leaves us. And then take that time in May to hold a  
12 proceeding two or three days in length, where you are  
13 permitted to, in lieu of affidavits or declarations,  
14 actually put on live witnesses, and they would be subject  
15 to cross-examination, or put in witness statements,  
16 declarations, and have only cross-examination. That's the  
17 most inventive way that I have come up with to try and  
18 proceed.

19 I understand enough about the concept of leverage that  
20 I understand that Motorola thinks that 2013 is just fine,  
21 but I am not willing to extend out that far.

22 Mr. Jenner, I welcome your wisdom on these questions.

23 MR. JENNER: Your Honor, I particularly appreciate  
24 counsel's reference to a blitzkrieg. I feel that this is  
25 a little bit of a blitzkrieg being visited upon us, since

1 we didn't have any inkling this was coming until this  
2 morning.

3 Let me take this in pieces. First, I am very  
4 surprised that counsel would think it is appropriate --  
5 with all due respect to this court, and every other  
6 federal district court, to seek to have the court dictate  
7 what a German court can do.

8 THE COURT: Welcome to the Ninth Circuit, sir.

9 MR. JENNER: It may be. I have to play on the  
10 field I am trotting out onto, your Honor. I note that  
11 counsel goes so far as to say that the German standards  
12 may well be different. I don't know what the German  
13 standards are. Counsel suggests they may have a very  
14 different view of how you interpret a contract. There are  
15 questions in this case of how certain standards that are  
16 international in nature may be construed, how you  
17 interpret a contract, what the potential remedies might  
18 be. But even though those are different, counsel would  
19 have your Honor issue an edict to a German court, when  
20 they have full opportunity to go to the German court and  
21 litigate those issues, which in fact they are doing.

22 THE COURT: I think they want the edict to be read  
23 to you, as opposed to the German court.

24 MR. JENNER: It would be phrased in terms of,  
25 Motorola, you can't do this. But the effect of that is to

1 speak to Motorola, and effectively say that a German court  
2 shouldn't have the opportunity to adjudicate a German  
3 dispute. A piece of this is a German dispute.

4 I think there is an open question as to how much your  
5 Honor will ultimately adjudicate here, as to whether or  
6 not Microsoft can be enjoined by Motorola from  
7 distributing products in the United States, may or may not  
8 be the same question about whether or not Microsoft can be  
9 enjoined in Germany, and whether a German court ought to  
10 be the institution that speaks to that.

11 They are in Europe. They are in front of the European  
12 Commission. They are in front of the German courts. I  
13 suspect they may be in front of other courts. I'm not  
14 quite sure, frankly. And they come and say, oh, that is  
15 not good enough, we can't seek process in the courts of  
16 Germany or the European community, we want this court to  
17 disrupt that process under the guise of telling Motorola  
18 what you can or can't do.

19 I submit there are questions of --

20 THE COURT: Stop for a second. I don't need to  
21 here the merits of this right now. I agree with you, it  
22 is a very interesting question. It certainly is outside  
23 the realm of what I normally do. Is there a reason why  
24 they shouldn't file it, and then we can hear it on the  
25 merits?

1                   MR. JENNER: Your Honor, I think it is appropriate  
2 for the court to hear motions. I am certainly not going  
3 to be the person to say that is not an appropriate thing  
4 for the court to do. I think it is a waste of time. I  
5 think it is inappropriate.

6                   I really have the same feelings I had when we had that  
7 telephone conference a few weeks ago, and I heard counsel  
8 argue fact issue after fact issue. My response is, your  
9 Honor, we are not on a summary judgment motion. I don't  
10 think this is appropriate. I think it is a waste of your  
11 time. That's all I can say on that subject.

12                  THE COURT: Continue on.

13                  MR. JENNER: Now, as far as having a trial or  
14 mini-trial proceeding accelerated to May, the very  
15 blitzkrieg that Microsoft says it doesn't want to be  
16 subjected to is the blitzkrieg they are perfectly happy to  
17 subject us to.

18                  We have served quite a bit of discovery. So has  
19 Microsoft. We have 30(b) (6) notices out to Microsoft. We  
20 have party deposition notices out to Microsoft witnesses.  
21 We have third-party deposition notices out to third  
22 parties. We have document discovery that is ongoing, we  
23 have written discovery. It is going to take at least what  
24 is remaining of 30 days to get the interrogatories and  
25 document requests finished. It is going to take whatever

1 time it requires to get depositions taken. That is before  
2 you start doing the normal pretrial prep for a trial.

3 I think I have told your Honor before, we are  
4 perfectly happy to slot a trial on the merits, if that's  
5 necessary, into the place in November where you had it,  
6 because it contemplated the fact discovery we submit we  
7 need, it contemplated the expert discovery that I think  
8 the court will need. I know you have expressed some  
9 questions about that. But we think that there is a  
10 considerable amount of expert discovery regarding  
11 standards that will be appropriate here.

12 Counsel says this was dealt with in the ITC. I said  
13 last time, aspects were dealt within the ITC, but the full  
14 panoply of issues before this court were not. That's why  
15 we are taking discovery.

16 I submit, your Honor, to get all of this accomplished,  
17 both in the form of any discovery that can possibly be  
18 mustered, along with good pretrial preparation, to have a  
19 meaningful trial-like procedure in May is too fast.

20 We are happy to keep the schedule you originally had  
21 in November, live with the discovery deadlines, do all of  
22 the things that need to get done to get that marshaled, if  
23 a summary judgment motion in the meantime does not prove  
24 to be effective. I think Microsoft may be planning to  
25 file a summary judgment motion. If they do, so be it.

1 They are certainly entitled to do that. You told them  
2 they could do it. We will deal with that.

3 Getting to a trial on the merits on these issues all  
4 of a sudden in May, your Honor, we submit that would be a  
5 burden that would disrupt the discovery processes that are  
6 going on, and the other things that we should have the  
7 opportunity to do before trial. I would ask you not to do  
8 that.

9 THE COURT: Let me see if I can make myself clear.  
10 If this were a breach of contract case, and one party came  
11 in and said, Judge, here is the contract, here are the  
12 facts, this is what I did, this is what they did, I can  
13 dispose of that on summary judgment, because the facts  
14 that are in disagreement are not -- I mean, if one person  
15 says, it was day, and the other person says night, then,  
16 yes, we have an issue of fact. On the other hand, what  
17 has been represented here is that the record is clear, I  
18 mean there was an exchange of letters, whatever. That  
19 sounds like it is a motion that can be disposed of on  
20 summary judgment.

21 Where I get into trouble is when we get into this  
22 issue of, yes, the contract has words in it, but what do  
23 they mean? That normally is a question of law for the  
24 court to decide, other than the somewhat different  
25 Washington rules, that Mr. Palumbo, and Mr. Harrigan can

1 share with out-of-town counsel, that says, under certain  
2 fairly different circumstances they can become issues of  
3 fact.

4 I guess what I have in mind is at least trying in this  
5 window in May to see if the contract can be interpreted,  
6 and is the conduct of the parties really in dispute. And  
7 so start with that as the premise.

8 I agree with you, we are not abolishing the November  
9 trial if indeed that is necessary, but I would like to  
10 test if it is necessary.

11 MR. JENNER: Your Honor, I guess I am not entirely  
12 sure then what the issue or issues for the May proceeding  
13 would be.

14 THE COURT: Well, I think they are going to say  
15 under the contract is Motorola required to -- We have  
16 already established that you satisfied two of the four  
17 terms of their original issues. It was the last two that  
18 were causing me problems. What I am, I guess, proposing  
19 is a motion for summary judgment on those two remaining  
20 terms, which I can find in favor of Motorola, I can find  
21 in favor of Microsoft, or I can find that I have to have a  
22 trial. That's what I am proposing.

23 MR. JENNER: Your Honor, I would say -- As I  
24 understand it -- I still think that we should have an  
25 opportunity to take the discovery, because I think the

1 discovery potentially bears on those issues.

2 THE COURT: Okay. Thank you. Mr. Harrigan.

3 MR. HARRIGAN: Yes, your Honor. I will reiterate  
4 that we believe that a May mini-trial will very likely  
5 resolve this entire RAND issue, for the reasons the court  
6 has already alluded to.

7 If the court finds there was no remediation, that  
8 means Microsoft is entitled to a license, which disposes  
9 of the injunction issue, which is what this is really all  
10 about. It is really all about can Motorola get an  
11 injunction against these various products.

12 If the court finds that Motorola's offer was  
13 outrageous, there is no contract interpretation issue,  
14 because the court has already said that they can't make an  
15 outrageous offer, and therefore that would be breach, that  
16 would decide the case.

17 Then, if the court does need to interpret the  
18 contract, it may or may not require some input from a  
19 jury, but we do not need massive amounts of discovery to  
20 interpret the RAND contract language. And there is no  
21 issue with regard to third-party beneficiary status.

22 So I believe -- We are all operating here on what is  
23 the probability that a great deal of time can be saved and  
24 this matter resolved expeditiously. I believe there is a  
25 very high probability that the court can rule up or down

1 on the controlling issues, probably without a jury, but,  
2 if need be, with a jury, and that this whole matter can be  
3 easily presented in two or three days.

4 And it solves the -- it largely solves, subject to  
5 some -- If necessary, we file this motion. But all we  
6 really are asking is -- The injunction, if the court  
7 decides to issue it, it will issue. The question is, will  
8 Motorola enforce it? So the court isn't even indirectly  
9 telling the German court not to do something. What we are  
10 saying is if Motorola will just hang onto the status quo,  
11 which is the products get sold and we litigate the issue  
12 of whether -- litigate the RAND issues here, if that takes  
13 an extra month or two past the April 17th date, a  
14 \$300 million bond ought to cover the problem. And we  
15 would just keep the status quo in place. You are not  
16 telling anybody that no injunction order will be entered,  
17 only that Motorola can't enforce it until this court  
18 decides the answers to the controlling questions. Thank  
19 you.

20 THE COURT: All right. This will be confirmed in  
21 the minute order that we issue. I am granting permission  
22 for Microsoft to file its motion in regards to ordering  
23 Motorola to not enforce the hypothetical German judgment.  
24 I don't know Ninth Circuit law well enough. I know  
25 somehow a jury in San Francisco deciding something that

1       happened in Honduras or Ecuador was a violation of  
2       Ecuadorian law. I am willing to look at the law and be  
3       convinced one way or the other.

4       I am also authorizing Microsoft to file its motion for  
5       summary judgment on the remaining two questions that are  
6       left over from the court's prior ruling. One and two, I  
7       think I found, three and four, I did not. You are moving  
8       on three and four.

9                    MR. HARRIGAN: That is three and four issues in  
10          our original motion?

11                  THE COURT: Yes.

12                  MR. HARRIGAN: Yes. Thank you, your Honor.

13                  THE COURT: I would like that filed by March 30th.  
14          That will give the parties an opportunity to have it fully  
15          briefed.

16                  I understand what Mr. Jenner is saying. I think I  
17          will know a lot more about where we are after I see the  
18          briefing on that. You need to lay out what are the  
19          non-contested facts, which Microsoft has said on occasion  
20          are truly uncontested. I don't think I have ever heard if  
21          Motorola contests them or not. It seems to me part of  
22          that is what facts are necessary for me to reach the next  
23          issues, Issues 3 and 4 in the case. And I don't want to  
24          try and predict that without knowing better what they are.

25                  That motion will be briefed and filed in accordance

1 with the rules in the Western District, with the thought  
2 that we will use some of that May time to give you an  
3 extended opportunity to argue the case if that is what we  
4 turn out to be doing. I am not sure until I know more  
5 what, if any, witnesses will be heard at that time.

6 Mr. Jenner, any questions on behalf of Motorola, sir?

7 MR. JENNER: Your Honor, I think I understand what  
8 the schedule is. We will certainly do everything  
9 necessary to comply with that.

10 THE COURT: Your summer associates are coming  
11 soon. It will give them something to do.

12 MR. JENNER: I was hoping they would give me an  
13 opportunity to go down to Honduras and get those answers  
14 for you.

15 MR. HARRIGAN: Your Honor, do you have any time  
16 frame in May -- range that you have in mind?

17 THE COURT: As part of our minute order we will  
18 pick out a day in there that is available, or two days  
19 that are available.

20 Counsel, we will be in recess. Thank you very much.

21 MR. PALUMBO: Your Honor, one thing for  
22 clarification purposes.

23 THE COURT: You are going to earn your three hours  
24 this morning.

25 MR. PALUMBO: As surprised as you were when we

1 learned last night about 5:00 that Microsoft was agreeing  
2 to seven of our ten proposed constructions.

3 Just for clarity, it sounds like for the next Markman  
4 hearing, in addition to discussing the different  
5 constructions before we file briefs, after the parties  
6 file briefs we should have another meet and confer, see if  
7 we can't eliminate some of the terms where we think we  
8 have a disagreement, and then advise the court that we are  
9 either going to go forward on all ten terms that are in  
10 the briefing, or where we managed to reach agreement. I  
11 wanted to have a clarification that there would be another  
12 meet and confer to try to avoid what happened this time  
13 around.

14 THE COURT: Why don't you all be seated. Counsel,  
15 it became clear to us as we were working our way through  
16 these that many of these -- I won't use the word  
17 "disingenuous." I will simply use the word "creative."  
18 And I understand creative constructions are permitted.  
19 They are to be discouraged.

20 So what I would like you to do is go back, figure out  
21 how many claim terms you have left, ask yourselves, you  
22 know, are they really essential or are we simply trying to  
23 run this as long as we can run it.

24 Picking out those ten claim terms, discussing the  
25 question of a tutorial, if they were going to involve

1 different components -- I might stress my appreciation to  
2 the people who put on the tutorial today. I thought that  
3 was helpful. But a lot of it was stuff that we had spent  
4 hours puzzling through, so you can save us that next time.  
5 Once you have exchanged your proposed claim constructions,  
6 that is when I would like you to sit down and really ask,  
7 are we in disagreement? Knowing that you have to come in  
8 here and put up with me, is this really something that we  
9 need to bother the court with? And I think if we know  
10 that earlier, as opposed to later, it will save you all an  
11 immense amount of money to not have these folks grind away  
12 on ten terms, only to find out seven of them you are in  
13 agreement on. Last time I checked, companies like to save  
14 money. Does that answer your question?

15 MR. PALUMBO: That is helpful. I think we will  
16 endeavor, but it sounds like we should redouble our  
17 efforts on that.

18 THE COURT: Endeavor harder. We will be in  
19 recess.

20 (Adjourned.)

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1                   **CERTIFICATE**  
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I, Barry L. Fanning, Official Court Reporter, do hereby  
certify that the foregoing transcript is true and correct.

10                   S/Barry L. Fanning  
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